

No. 33194

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

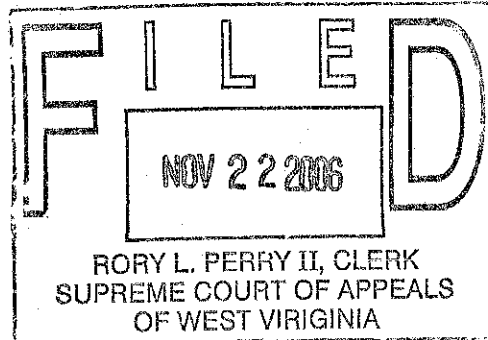
AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

Petitioners/Plaintiffs below,

v.

LARRY'S DRIVE-IN PHARMACY, INC.,
A West Virginia Corporation,

Respondent/Defendant below.



**MOTION OF NATIONAL ASSOCIATION OF CHAIN DRUG STORES FOR
LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF LARRY'S DRIVE-IN PHARMACY**

COMES NOW the National Association of Chain Drug Stores ("NACDS") pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, and requests leave to file the attached brief as *Amicus Curiae* in support of Larry's Drive-In Pharmacy, Inc.

NACDS was founded in 1933 and is based in Alexandria, Virginia. NACDS is a tax-exempt trade association whose members are over 180 retail chain community pharmacy companies. Chain community pharmacy is comprised of more than 37,000 retail community pharmacies and over 114,000 pharmacists. Chain community pharmacies fill over sixty percent of three billion prescriptions dispensed annually in the United States. Fourteen NACDS chain members operate nearly 300 community pharmacies in West Virginia and employ over 850 pharmacists.

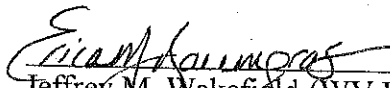
NACDS seeks to file the *amicus* brief, attached hereto, on behalf of our members whose retail community pharmacies serve West Virginians and others across the country. NACDS brings an important national perspective to the issue before this Court, a perspective vital to our members. Nationally, courts and legislatures have recognized the important and critical role pharmacies play in our nation's health care. Indeed, several jurisdictions have already identified pharmacies as health care providers under their respective medical malpractice acts, as explained more fully in NACDS's brief.

For the reasons stated more fully in its brief, NACDS respectfully asks that the Court uphold the June 2, 2006 Order of the Circuit Court of Boone County which found that a licensed pharmacy is a health care provider under W.Va. Code § 55-7B-2(c).

WHEREFORE, NACDS respectfully seeks leave to submit the attached as *Amicus Curiae* under Rule 19 to assist this Court in its assessment of the pending appeal in the upon captioned case.

NATIONAL ASSOCIATION OF
CHAIN DRUG STORES, INC.,

By Counsel,


Jeffrey M. Wakefield (WV Bar No. 3894)
Erica M. Baumgras (WV Bar No. 6862)
Jaclyn A. Bryk (WV Bar No. 9969)
Flaherty, Sensabaugh & Bonasso, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, WV 25338-3843
(304) 345-0200

No. 33194

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

Petitioners/Plaintiffs below,

v.

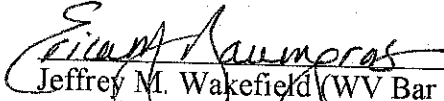
LARRY'S DRIVE-IN PHARMACY, INC.,
A West Virginia Corporation,

Respondent/Defendant below.

BRIEF OF THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES

AS *AMICUS CURIAE*

IN SUPPORT OF LARRY'S DRIVE-IN PHARMACY


Jeffrey M. Wakefield (WV Bar No. 3894)
Erica M. Baumgras (WV Bar No. 6862)
Jaclyn A. Bryk (WV Bar No. 9969)
Flaherty, Sensabaugh & Bonasso, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, WV 25338-3843
(304) 345-0200

Counsel for National Association of Chain Drug Stores, Inc.

TABLE OF CONTENTS

INTRODUCTION	4
ARGUMENT	4
I. OTHER STATE COURTS HAVE FOUND THAT PHARMACIES AND/OR PHARMACISTS ARE HEALTH CARE PROVIDERS UNDER MALPRACTICE ACTS	5
II. OTHER JURISDICTIONS EXPRESSLY LIST PHARMACISTS AS HEALTH CARE PROVIDERS IN THEIR MEDICAL MALPRACTICE ACTS	8
III. OTHER WEST VIRGINIA STATUTES INDICATE THAT PHARMACISTS AND PHARMACIES ARE CONSIDERED TO BE HEALTH CARE PROVIDERS	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Becker v. Meyer Rexall Drug Co.</i> , 367 N.W.2d 424, 426 (Ct. App. Mich. 1985)	7-8
<i>Cackowski v. Wal-Mart Stores, Inc.</i> , 767 So.2d 319 (Ala. 2000)	5-6
<i>Ex Parte Rite Aid of Alabama, Inc.</i> , 768 So.2d 960 (Ala. 2000)	5-6
<i>Kohl v. American Home Products Corp.</i> , 78 F.Supp.2d 885, 890-91 (W.D. Ark. 1999)	7-8
<i>Price v. Walgreen Co.</i> , 322 F.Supp.2d 1179, 1183-85 (D.C. Colo. 2004)	7

Statutes

<i>Ala. Code</i> §§6-5-481(1) and (8)	5
<i>Ark. Code Ann.</i> §16-114-201(2)	6-7
<i>La. Stat. Ann. Rev. Stat.</i> 40:1299.41(A)(1)	8
<i>W. Va. Code</i> §30-5-1b(3)	9
<i>W. Va. Code</i> §30-5-1b(4)	9
<i>W. Va. Code</i> §30-5-1, et. seq.	9
<i>W. Va. Code</i> §30-5-26 (2005)	9
<i>W. Va. Code</i> §30-5-27 (2005)	9
<i>W. Va. Code</i> §30-5-27(a) and (d)	10
<i>W. Va. Code</i> §30-7-15 (a) (1992)	10
<i>W. Va. Code</i> §30-15-7 (1992)	10
<i>W. Va. Code</i> §55-7B-2(c) <i>Medical Professional Liability Act</i>	4, 8, 10
<i>Va. Code Ann.</i> §8.01-581.1	8

INTRODUCTION

The National Association of Chain Drug Stores ("NACDS") was founded in 1933 and is based in Alexandria, Virginia. NACDS is a tax-exempt trade association whose members are over 180 retail chain community pharmacy companies. Chain community pharmacy is comprised of more than 37,000 retail community pharmacies and over 114,000 pharmacists. Chain community pharmacies fill over sixty percent of three billion prescriptions dispensed annually in the United States. Fourteen NACDS chain members operate nearly 300 community pharmacies in West Virginia and employ over 850 pharmacists.

NACDS joins the arguments, in whole, with Rite Aid of West Virginia, Inc.'s ("Rite Aid") *Amicus* brief. Rather than repeat those arguments herein, NACDS will supplement them briefly for the Court's benefit.

ARGUMENT

In addition to the convincing arguments presented by Rite Aid as to why pharmacies are health care providers under the Medical Professional Liability Act ("MPLA"), W.Va. Code § 55-7B-2(c), NACDS draws this Court's attention to the following court decisions and statutes from other jurisdictions. These materials reinforce the lower court's conclusion that pharmacies are correctly viewed as health care providers under the West Virginia MPLA.

I. OTHER STATE COURTS HAVE FOUND THAT PHARMACIES AND/OR PHARMACISTS ARE HEALTH CARE PROVIDERS UNDER MALPRACTICE ACTS¹

In Alabama, the state's medical malpractice act applies to both "medical practitioners" and "other health care providers." Ala. Code §§ 6-5-481(1) and (8). "Other health care providers" include "[a]ny professional corporation or any person employed by physicians . . . who are directly involved in the delivery of health care services." *Id.* § 6-5-481(8). While pharmacies and pharmacists are not expressly included in this definition, the Alabama Supreme Court has had no difficulty in concluding that pharmacies and pharmacists are indeed included. *See Cackowski v. Wal-Mart Stores, Inc.*, 767 So.2d 319 (Ala. 2000); *Ex Parte Rite Aid of Alabama, Inc.*, 768 So.2d 960 (Ala. 2000).

In *Cackowski*, the Alabama Supreme Court had to address the question of whether pharmacists were "other health care providers" under the state's medical malpractice act for the first time. *See Cackowski*, 767 So.2d at 322. In doing so, that court reviewed analogous cases in which it decided other types of professionals were health care providers in light of their relationship with the doctor, patient, and the provision of health care. *See id.* at 323-24 (discussing cases in which an orthotist, the American Red Cross, and a nurse were found to be other health care providers). When it came to pharmacists, the Alabama Supreme Court found:

An individual goes to a physician for treatment of a physical complaint. Upon examining the patient, the physician may determine that a course of medication is necessary to treat the patient's condition. Accordingly, the

¹ In its Brief on the Certified Question, Petitioner dismissively surveys state cases and laws regarding the application of their respective medical malpractice acts to pharmacists and pharmacies. Petitioner's Brief at 17-20. Below, NACDS provides the Court with additional critical information (*e.g.*, legal analysis/verbatim language) from many of these sources to give the Court a comprehensive sense of how the question before it has been resolved by others.

physician writes out a prescription, which the patient takes to the pharmacy of his choice to be filled. Although it is the physician who prescribes the medication, it is only the pharmacist/pharmacy that can fill the prescription, by supplying the patient with the called-for medication . . .

Because a pharmacist and/or a pharmacy is inextricably linked to a physician's treatment of his patients, the dispensing of drugs is an integral part of the delivery of health care services to the public. For this reason, we conclude that a pharmacist is within the definition of "other health care provider" set out in the Alabama Code . . .

Id. at 342-25 (emphasis added). In arriving at this conclusion, the Alabama Supreme Court noted that other jurisdictions likewise have found that pharmacies and pharmacists are health care providers under their respective medical malpractice laws or have state statutes which specifically list pharmacists as health care providers. *See id.* at 325 n. 2 (identifying cases from Arizona, Michigan, and Ohio and statutes from Louisiana, Missouri, South Carolina, Texas, and Washington State).

In *Ex parte Rite Aid*, the Alabama Supreme Court eliminated any doubt as to whether pharmacies also fall within the definition of "other health care providers" under Alabama's medical malpractice act. *See Ex parte Rite Aid*, 768 So.2d at 961 (stating that the "sole issue" was "whether the operator of a pharmacy is an 'other health care provider'"). Relying exclusively on the reasoning in *Cackowski*, that court easily held that Rite Aid, a pharmacy operator, was included in the state's definition of "other health care provider." *See id.* at 962 (adopting its earlier analysis from *Cackowski* which stated that "a pharmacist and/or a pharmacy is inextricably linked to a physician's treatment of his patients, the dispensing of drugs is an integral part of the delivery of health care services to the public.") (internal citations omitted).

In Arkansas, the state medical malpractice act covers "medical care providers." *See Ark. Code Ann. § 16-114-201(2)*. This category expressly includes pharmacists, but

does not mention pharmacies. *See id.* When faced with the question of whether pharmacies are covered under the medical malpractice act in Arkansas, the United States District Court for the Western District of Arkansas first explored the nature of the practice of pharmacy and its evolving role in healthcare. *See Kohl v. American Home Products Corp.*, 78 F. Supp.2d 885, 890-91 (W.D. Ark. 1999). It noted that “there appears to be an increasing recognition that pharmacists are trained professionals” and that courts no longer view pharmacies as warehouses with pharmacists as mere shipping clerks. *See id.* at 891 (reciting the Arkansas pharmacy practice act provisions defining the independent profession of pharmacy and its practice).

In the end, the district court rejected plaintiff’s claim that, because the state medical malpractice act mentioned pharmacists, but not pharmacies, pharmacies are not healthcare providers. *See id.* at 896. That court found that “a pharmacy provides professional medical services, namely dispensing prescription medication, solely through a pharmacist.” *Id.* Consequently, it held that the reference to pharmacist included a reference to pharmacy as they were inextricably linked. *See id.* at 897; *see also Price v. Walgreen Co.*, 322 F.Supp.2d 1179, 1183-85 (D.C. Colo. 2004) (relying on prior case law and the theory of *respondeat superior* to conclude that pharmacies fall within the definition of “health care professional” under the Colorado medical malpractice act, even though only licensed pharmacists are mentioned therein).

Lastly, the Michigan Court of Appeals also has found that pharmacies fall under Michigan’s malpractice statute. *See Becker v. Meyer Rexall Drug Company*, 367 N.W.2d 424, 426 (Ct. App. Mich. 1985). In reaching that conclusion, that court found that the defendant pharmacy was (1) “a member of a licensed profession”; (2) charged with

failing to live up to its professional responsibility resulting in harm to the plaintiff, and (3) in a professional relationship with the plaintiff. *See id.*

II. OTHER JURISDICTIONS EXPRESSLY LIST PHARMACISTS AS HEALTH CARE PROVIDERS IN THEIR MEDICAL MALPRACTICE ACTS

As clearly explained in Rite Aid's *Amicus* Brief ("Brief"), the definition of health care providers in W. Va. Code § 55-7B-2(c), the Medical Professional Liability Act, is not all inclusive. *See* Brief at 8 (discussing the phrase "including, but not limited to" which precedes the listing of specific health care providers). This means that the legislature conceived of other types of health care providers not listed. In determining who those others might be, how other jurisdictions define "health care providers" covered by their medical malpractice acts is instructive.

Other jurisdictions expressly include pharmacists in their definition of "health care providers." For example, Louisiana states that a "health care provider" is "a person . . . , corporation, facility or institution licensed or certified by this state to provide health care or professional services as a physician, . . . pharmacist . . ." La. Stat. Ann. Rev. Stat. 40:1299.41(A)(1). Virginia's "health care provider" definition mentions pharmacists as well, but it also includes "a corporation . . . or other entity . . . which employs or engages a licensed health care provider and which primarily renders health care services . . ." Va. Code Ann. § 8.01-581.1. Such a description effortlessly applies to pharmacies. And while the Arkansas definition of "health care provider" lists only pharmacists and not pharmacies, as explained above, a federal district court has found them to be so intertwined that pharmacies were implied in that state's "health care provider" definition too. *See Kohl v. American Home Products Corp.*, 78 F. Supp.2d 885, 896-97 (W.D. Ark. 1999).

III. OTHER WEST VIRGINIA STATUTES INDICATE THAT PHARMACISTS AND PHARMACIES ARE CONSIDERED TO BE HEALTH CARE PROVIDERS

A review of the West Virginia statute regarding pharmacists, pharmacy technicians, pharmacy interns and pharmacies, W.Va. Code § 30-5-1, *et seq.*, which was amended after the enactment of the MPLA, evidences the intent of the Legislature to treat these professionals as health care providers. Specifically, W.Va. Code §§ 30-5-26 and 30-5-27 (2005), permit a pharmacist to participate in a "collaborative pharmacy practice" which is defined at W.Va. Code § 30-5-1b(3) as the practice of pharmacy where one or more pharmacists have jointly agreed, on a voluntary basis, to work in conjunction with one or more physicians under written protocol where the pharmacist(s) may perform certain patient care functions authorized by the physician(s) under certain specified conditions and limitations.

The pharmacists engaging in a collaborative pharmacy practice must have on file a "collaborative pharmacy practice agreement," defined at W.Va. Code § 30-5-1b(4) as a written signed agreement between a pharmacist, a physician, and the individual patient who as granted informed consent, that provides for collaborative pharmacy practice for the purpose of drug therapy management of a patient, which has been approved by the Board of Pharmacy, the Board of Medicine in the case of an allopathic physician or the Board of Osteopathy in the case of an osteopathic physician. W.Va. Code § 30-5-26 specifies the criteria concerning licensure, liability insurance coverage and qualifications a pharmacist must meet in order to participate in a collaborative pharmacy practice agreement.

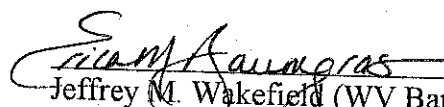
Pursuant to such an agreement, a pharmacist may conduct drug therapy management activities approved by the collaborating physician, and such agreements are allowed in the hospital setting, the nursing home setting, the medical school setting, and the hospital community and ambulatory care clinics. See W.Va. Code § 30-5-27(a) and (d). This recent recognition by the West Virginia Legislature of pharmacists as health care providers who may provide drug therapy management and perform services for patients further substantiates the argument by the Respondent that such professionals are correctly viewed as health care providers for the purpose of the MPLA.²

CONCLUSION

For the reasons stated in the Rite-Aid *amicus curiae* brief and supplemented by NACDS herein, NACDS respectfully requests that the Court uphold the ruling below which finds a pharmacy to be a health care provider under the Medical Professional Liability Act.

NATIONAL ASSOCIATION OF
CHAIN DRUG STORES, INC.,

By Counsel,


Jeffrey M. Wakefield (WV Bar No. 3894)
Erica M. Baumgras (WV Bar No. 6862)
Jaclyn A. Bryk (WV Bar No. 9969)
Flaherty, Sensabaugh & Bonasso, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, WV 25338-3843
(304) 345-0200

² The collaborative relationship between physicians and other health care providers has been codified for other professionals as well, including nurse-midwives and advanced nurse practitioners. See W.Va. Code §§ 30-15-7 (1992), 30-7-15(a) (1992).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

Petitioners/Plaintiffs below,

v.

LARRY'S DRIVE-IN PHARMACY, INC.,
A West Virginia Corporation,

Respondent/Defendant below.

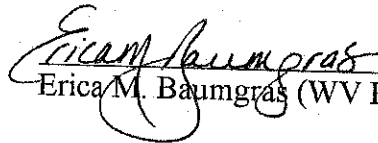
CERTIFICATE OF SERVICE

I, Erica M. Baumgras, counsel for Amicus Curiae National Association of Chain Drug Stores, Inc., do hereby certify that true copies of the foregoing Motion of the National Association of Chain Drug Stores for Leave to File Brief as *Amicus Curiae* and a copy of the Brief of National Association Of Chain Drug Stores, Inc. as *Amicus Curiae* In Support of Larry's Drive-In Pharmacy were mailed this the 22nd day of November, 2006, first class postage prepaid, to the following counsel of record:

J. Robert Rogers, Esq.
Armada, Rogers, & Thompson
3972 Teays Valley Road
Hurricane, West Virginia 25526
Counsel for Petitioners

Jay M. Potter, Esq.
Schumacher, Francis & Nelson
P.O. Box 3029
Charleston, West Virginia 25331
Counsel for Respondent

Webster J. Arceneaux, Esq.
Lewis Glasser Casey & Rollings, P.L.L.C.
P.O. Box 1746
Charleston, West Virginia 25326
Counsel for Amicus Rite-Aid


Erica M. Baumgras (WV Bar No. 6862)